

FROM THE COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS

The Committee solicits comment on the following proposals by April 1, 2014. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Committee on Model Civil Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

PROPOSED

The Committee is considering the adoption of amended instructions for use in cases where a will or trust is being contested and the deletion of two instructions previously used in those cases.

[AMENDED] M CIV JI 170.44

M CIV JI 170.44 WILL CONTESTS: UNDUE INFLUENCE AND CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

The contestant has the burden of proving by a preponderance of the evidence that there was undue influence exerted on the decedent in the making of the will.

Undue influence is influence which is so great that it overpowers the decedent's free will and prevents [him / her] from doing as [he / she] pleases with [his / her] property.

To be "undue," the influence exerted upon the decedent must be of such a degree that it overpowered the decedent's free choice and caused [him / her] to act against [his / her] own free will and to act in accordance with the will of the [person / persons] who influenced [him / her].

The influence exerted may be by [force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / (other)]. A will which results from undue influence is a will which the decedent would not otherwise have made. It disposes of the decedent's property in a manner different from the disposition the decedent would have made had [he / she] been free of such influence.

The word "undue" must be emphasized, because the decedent may be influenced in the disposition of [his / her] property by specific and direct influences without such influences becoming undue. This is true even though the will would not have been made but for such influence. It is not improper for a [spouse / child / parent / relative / friend / housekeeper / (other)] to—

- a. *([advise / persuade / argue / flatter / solicit / entreat / implore],)
- b. (appeal to the decedent's [hopes / fears / prejudices / sense of justice / sense of duty / sense of gratitude / sense of pity],)
- c. *(appeal to ties of [friendship / affection / kinship],)
- d. *([other],)

provided the decedent's power to resist such influence is not overcome and [his / her] capacity to finally act in accordance with [his / her] own free will is not overpowered. A will which results must be the free will and purpose of the decedent and not that of [another person / other persons].

Mere existence of the opportunity, motive or even the ability to control the free will of the decedent is not sufficient to establish that the decedent's will is the result of undue influence.

Undue influence may be proven by indirect or circumstantial evidence.

**If you find:

- a. That [name] had a confidential or fiduciary relationship with the decedent; and
- b. That [name] (or a person or interest he represented) benefited from the will; and
- c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence.

A "confidential or fiduciary relationship" is a relationship where one person places confidence, reliance and trust in another person, such that the second person has authority or power over some aspect of the first person's affairs, and the first person expects that the second person will act with integrity and fidelity towards the first person's affairs. The relationship may be formal, informal, professional and/or personal.

Note on Use

*The Court should choose among subsections a-d those which are applicable to the case.

This instruction should be accompanied by MCivJI 8.01, Meaning of Burden of Proof.

**Only give the instruction regarding a confidential or fiduciary relationship if the contestant seeks to establish a presumption of undue influence and has offered evidence of each of the three elements of the presumption into evidence. Whether the contestant has introduced evidence of the three elements of the presumption is a

procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant. MRE 301. The court need not, and should not, discuss its procedural determination as to the presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant. *Widmayer*, 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *Id.*

Comment

In re Estate of Karmey, 468 Mich 68; 658 NW2d 796 (2003); *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985); *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1950); *In re Balk's Estate*, 298 Mich 303; 298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 170.44 was added January 1984.

Amended December 8, 2003.

[DELETED] M CIV JI 170.45

M CIV JI 170.45 WILL CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

~~To establish that the decedent made the will as a result of undue influence, the contestant has the burden of proving all three of the following propositions:~~

- ~~a. That [name] had a fiduciary relationship with the decedent.~~
- ~~b. That [name] (or a person or interest he represented) benefited from the will, and~~
- ~~c. That by reason of the fiduciary relationship [name] had an opportunity to influence the decedent in giving that benefit.~~

~~—Your verdict will be against the will if you find that all three propositions have been proven. Otherwise, your verdict will be in favor of the will.~~

~~— A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.~~

Note on Use

The committee recommends that this instruction be deleted in light of the proposed amendment to M Civ JI 170.44, making M Civ JI 170.45 no longer necessary.

~~In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e., the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985).~~

~~Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ JI 170.44 – Will Contests: Undue Influence – Burden of Proof.~~

~~A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; *Widmayer*, supra. If there is no genuine dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301; *Widmayer*, supra.~~

~~Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, *In re Kanable Estate*, 47 Mich App 299; 209 NW2d 452 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, *In re Estate of Karmey*, 468 Mich 68,74 fn 2,3; 658 NW2d 796 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. *In re Estate of Karmey*.~~

~~The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or~~

fiduciary relationship" have identical meanings. See, ~~*In re Estate of Karmey*~~.

This instruction should be accompanied by M Civ JI 8.01, Meaning of Burden of Proof.

Comment

~~*In re Estate of Karmey*, *Widmayer*, *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976). See also *In re Cox Estate*, 383 Mich 108; 174 NW2d 558 (1970) (fiduciary relationship of attorney and clergyman); *In re Vollbrecht Estate*, 26 Mich App 430; 182 NW2d 609 (1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney and her accountant were also trustees of foundation); *In re Spillette Estate*, 352 Mich 12; 88 NW2d 300 (1958); *In re Haskell's Estate*, 283 Mich 513; 278 NW 668 (1938) (will in favor of attorney upheld where testatrix obtained independent advice; presumption of undue influence rebutted); *In re Eldred's Estate*, 234 Mich 131; 203 NW 870 (1926) (doctor); *In re Hartlerode's Estate*, 183 Mich 51; 148 NW 774 (1914) (clergyman).~~

History

M Civ JI 170.45 was added January 1984.

Amended March 1990, December 8, 2003.

[AMENDED] M CIV JI 179.10

M CIV JI 179.10 TRUST CONTESTS: UNDUE INFLUENCE AND CONFIDENTIAL OR FIDUCIARY RELATIONSHIP

The contestant has the burden of proving by a preponderance of the evidence that there was undue influence exerted on the settlor in the [creation / amendment / revocation] of the trust.

Undue influence is influence that is so great that it overpowers the settlor's free will and prevents [him / her] from doing as [he / she] pleases with [his / her] property.

To be "undue," the influence exerted upon the settlor must be of such a degree that it overpowered the settlor's free choice and caused [him / her] to act against [his / her] own free will and to act in accordance with the will of the [person / persons] who influenced [him / her].

The influence exerted may be by [force / threats / flattery / persuasion / fraud / misrepresentation / physical coercion / moral coercion / other]. Action that results from undue influence is action that the settlor would not otherwise have taken. It disposes of the trust property in a manner different from the disposition the settlor would have made had [he / she] been free of such influence.

The word "undue" must be emphasized, because the settlor may be influenced in the disposition of the trust property by specific and direct influences without such influences

becoming undue. This is true even though the trust would not have been made but for such influence. It is not improper for a [spouse / child / parent / relative / friend / housekeeper / other] to—

- a. *([advise / persuade / argue / flatter / solicit / entreat / implore],)
- b. *(appeal to the decedent's [hopes / fears / prejudices / sense of justice / sense of duty / sense of gratitude / sense of pity],
- c. *(appeal to ties of [friendship / affection / kinship],)
- d. *([other],)

provided the settlor's power to resist such influence is not overcome and [his / her] capacity to finally act in accordance with [his / her] own free will is not overpowered. A trust that results must be the free will and purpose of the settlor and not that of [another person / other persons].

Mere existence of the opportunity, motive or even the ability to control the free will of the settlor is not sufficient to establish that [creation / amendment / revocation] of the trust is the result of undue influence.

Undue influence may be proven by indirect or circumstantial evidence.

**If you find:

- a. That [name] had a confidential or fiduciary relationship with the decedent; and
- b. That [name] (or a person or interest he represented) benefited from the will; and
- c. That [name] had an opportunity to influence the decedent in giving that benefit;

then you should consider such circumstances, along with all the evidence, in determining whether the contestant has proven undue influence.

A “confidential or fiduciary relationship” is a relationship where one person places confidence, reliance and trust in another person, such that the second person has authority or power over some aspect of the first person’s affairs, and the first person expects that the second person will act with integrity and fidelity towards the first person’s affairs. The relationship may be formal, informal, professional and/or personal.

Note on Use

*The Court should choose among subsections a-d those which are applicable to the case.

This instruction should be accompanied by M Civ JI 8.01, Definition of Burden of Proof.

**Only give the instruction regarding a confidential or fiduciary relationship if the contestant seeks to establish a presumption of undue influence and has offered evidence of each of the 3 elements of the presumption into evidence. Whether the

contestant has introduced evidence of the 3 elements of the presumption is a procedural matter, rather than an evidentiary matter, because it is the job of the finder of fact to decide, as an evidentiary matter, whether the contestant has proven the facts. *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985). If the court determines, as a procedural matter, that the contestant has established the presumption, the burden of producing evidence shifts to the opposing party, but the burden of proof always remains with the contestant. MRE 301. The court need not, and should not, discuss its procedural determination as to the presumption with the finder of a fact, in order to avoid influencing its verdict. If the opposing party produces no evidence to rebut the presumption, the court may direct a verdict in favor of the contestant. *Widmayer*, 422 Mich at 289. If the opposing party produces evidence to rebut the presumption, an inference remains for the jury to consider, which is reflected in the above instructions. See *Id.*

Comment

This instruction is virtually identical to M Civ JI 170.44

In re Estate of Karmey, 468 Mich 68; 658 NW2d 796 (2003); *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985); *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976); *In re Willey Estate*, 9 Mich App 245; 156 NW2d 631 (1967); *In re Langlois Estate*, 361 Mich 646; 106 NW2d 132 (1960); *In re Paquin's Estate*, 328 Mich 293; 43 NW2d 858 (1950); *In re Balk's Estate*, 298 Mich 303; 298 NW 779 (1941); *In re Kramer's Estate*, 324 Mich 626; 37 NW2d 564 (1949); *In re Reed's Estate*, 273 Mich 334; 263 NW 76 (1935); *In re Curtis Estate*, 197 Mich 473; 163 NW 944 (1917); *Nelson v Wiggins*, 172 Mich 191; 137 NW 623 (1912).

History

M Civ JI 179.10 was added June 2011.

[DELETED] M CIV JI 179.25

M CIV JI 179.25 TRUST CONTESTS: EXISTENCE OF PRESUMPTION OF UNDUE INFLUENCE—BURDEN OF PROOF

To establish that the settlor [created / amended / revoked] the trust as a result of undue influence, the contestant has the burden of proving all three of the following propositions:

1. that [name] had a fiduciary relationship with the settlor,
2. that [name] (or a person or interest he represented) benefited from the [creation / amendment / revocation] of the trust, and
3. that by reason of the fiduciary relationship [name] had an opportunity to influence the settlor in giving that benefit.

If you find that all three propositions have been proven, then the settlor's action is

~~invalid as a result of undue influence. Otherwise, the settlor's action is not invalid as a result of undue influence.~~

~~—A "fiduciary relationship" is one of inequality where a person places complete trust in another person regarding the subject matter, and the trusted person controls the subject of the relationship by reason of knowledge, resources, power, or moral authority.~~

Note on Use

The committee recommends that this instruction be deleted in light of the proposed amendment to M Civ JI 179.10, making M Civ JI 179.25 no longer necessary.

~~In cases involving the presumption of undue influence, this instruction is applicable only where two conditions coexist: 1) the putative fiduciary has not introduced evidence to "meet" or "rebut" the presumption, i.e., the fiduciary hasn't introduced evidence tending to show that the bequest was not made as a result of undue influence, and 2) there is an issue of fact whether one or more of the three components of the presumption of undue influence exists, MRE 301; *Widmayer v Leonard*, 422 Mich 280 (1985).~~

~~Where evidence has been introduced to meet the presumption, and in cases that do not involve the presumption of undue influence, the applicable undue influence instruction is M Civ JI 179.10 Trust Contests: Undue Influence— Definition.~~

~~A presumption casts on the opposing party only the obligation to come forward with evidence opposing the presumption, and if that is done, the effect of the presumption disappears, other than to prevent a directed verdict against the party having the benefit of the presumption, and the burden of proof remains with the person claiming undue influence. MRE 301; *Widmayer*, supra. If there is no genuine dispute that all elements of the presumption exist, and there is no evidence opposing the presumption, the party having the benefit of the presumption is entitled to a directed verdict. MRE 301; *Widmayer*, supra.~~

~~Often there will be no triable dispute on one or more of the elements of the presumption, in which case the court should not submit that element to the jury for decision. Typically, for example, there will be no dispute that the putative fiduciary benefited from the will. While it is said generally that the existence of a confidential relationship is a question of fact, *In re Kanable Estate*, 47 Mich App 299 (1973), there are a number of relationships which are fiduciary as a matter of law, e.g., principal-agent, guardian-ward, trustee-beneficiary, attorney-client, physician-patient, clergy-penitent, accountant-client, stockbroker-customer. Unless there is a dispute that the named relationship exists, it will be deemed a fiduciary relationship as a matter of law. See, *In re Estate of Karmey*, 468 Mich 68,74 fn 2,3 (2003). For that reason the definition in the instruction does not attempt to encompass all of them. A marriage relationship does not create a presumption of undue influence. *In re Estate of Karmey*.~~

The instruction uses the term "fiduciary relationship" instead of "confidential or fiduciary relationship" on the conclusion that the terms "fiduciary relationship" and "confidential or fiduciary relationship" have identical meanings. See, *In re Estate of Karmey*.

This instruction should be accompanied by M Civ JI 8.01, Definition of Burden of Proof.

Comment

This instruction is substantially similar to M Civ JI 170.45.

~~*In re Estate of Karmey*, *Widmayer*, *Kar v Hogan*, 399 Mich 529 (1976). See also *In re Cox Estate*, 383 Mich 108 (1970) (fiduciary relationship of attorney and clergyman); *In re Vollbrecht Estate*, 26 Mich App 430 (1970) (substantial benefit derived by charitable foundation wherein testatrix's attorney and her accountant were also trustees of foundation); *In re Spillette Estate*, 352 Mich 12 (1958); *In re Haskell's Estate*, 283 Mich 513 (1938) (will in favor of attorney upheld where testatrix obtained independent advice; presumption of undue influence rebutted); *In re Eldred's Estate*, 234 Mich 131 (1926) (doctor); *In re Hartlerode's Estate*, 183 Mich 51 (1914) (clergyman).~~

History

M Civ JI 179.25 was added June 2011.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

Chair: Alfred M. Butzbaugh
Reporter: Timothy J. Raubinger
Members: Benjamin J. Aloia; Hon. Jane M. Beckering; Mark R. Bendure; Hon. Mark T. Boonstra; W. Mack Faison; Donald J. Gasiorek; Gary P. Gordon; Elizabeth Phelps Hardy; Helen K. Joyner; Daniel J. McCarthy; Hon. Elizabeth M. Pezzetti; Hon. James R. Redford; Hon. Douglas B. Shapiro; Noreen L. Slank; Hon. Michael R. Smith; Paul C. Smith; Hon. Donald A. Teeple; Thomas Van Dusen; Hon. Michael D. Warren, Jr.; Thomas W. Waun.